

<b>Moulton-Barrett v Ascension Health-Is, Inc.</b>
2022 NY Slip Op 31996(U)
June 30, 2022
Supreme Court, Broome County
Docket Number: Index No. EFCA2021002663
Judge: Eugene D. Faughnan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 21<sup>st</sup> day of April, 2022, conducted by virtual oral argument

PRESENT: HON. EUGENE D. FAUGHNAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF BROOME

---

REX MOULTON-BARRETT, as the Executor  
of Estate of Maria Moulton-Barrett, Deceased,

Plaintiff,

-vs.-

ASCENSION HEALTH- IS, INC., OUR LADY OF  
LOURDES MEMORIAL HOSPITAL, INC., CARE  
MANAGE FOR ALL, LC, JEROME J.  
MIKLOUCICH, D.O., KIM EVANOSKI, CMCL  
LMSW MP, and JOHN AND JANE DOES not  
presently known to plaintiff,

Defendants.

---

DECISION AND ORDER

Index No. EFCA2021002663

APPEARANCES

Counsel for Plaintiff:

Ronald Benjamin, Esq.  
126 Riverside Dr.  
P.O. Box 607  
Binghamton, NY 13902

Counsel for Defendants  
Ascension Health- Is, Inc.,  
Our Lady of Lourdes Memorial  
Hospital, Inc. and Jerome J.  
Mikloucich, D.O.:

John M. Visco, Esq.  
Stillwell Midgley Visco  
69 Delaware Avenue, Suite 500  
Buffalo, NY 14202

Counsel for Defendants  
Care Manage for All, LLC and  
Kim Evanoski, CMCL LMSW MP:

Brian E. Lee, Esq.  
Bartlett LLP  
320 Carleton Avenue, Suite 7500  
Central Islip, NY 11722

**EUGENE D. FAUGHNAN, J.S.C.**

This matter is before the Court to consider: 1) the motion filed by Defendants Care Manage for All, LLC (“CMFA”) and Kim Evanoski, CMCL LMSW MP (“Evanoski”) seeking dismissal of the Complaint filed by Plaintiff Rex Moulton-Barrett (“Barrett”), as Executor of the Estate of Maria Moulton-Barrett (“Ms. Moulton-Barrett”), deceased, pursuant to CPLR 3211 (a)(5) based on res judicata and/or collateral estoppel; 2) the motion filed by Ascension Health – IS, Inc., Our Lady of Lourdes Memorial Hospital, Inc. and Jerome J. Miklouchich, D.O. (collectively “Ascension Defendants”) pursuant to CPLR 3211 (a)(5) and (a)(7) seeking dismissal of the Complaint; and 3) the cross motion of Plaintiff to file a Certificate of Merit pursuant to CPLR § 3012-a. The parties appeared for oral argument, which was conducted virtually by Microsoft Teams on April 21, 2022. After due deliberation, this Decision and Order constitutes the Court’s determination with respect to the pending motions.<sup>1</sup>

**BACKGROUND FACTS**

Plaintiff was appointed as Executor of the Estate of Ms. Moulton-Barrett, his mother, in August 2021, and brought this action concerning treatment she received in 2021 before she passed away on June 30, 2021. There are four causes of action ranging from wrongful death, medical and/or professional malpractice, survival claims for pain and suffering, and unnecessary expense.

In 2013, Barrett, a physician residing in California, was appointed by Ms. Moulton-Barrett to act as her health care proxy to make all health care decisions on her behalf except to the extent she stated otherwise. On November 30, 2021, Ms. Moulton-Barrett was evaluated by a physician at Ascension Lourdes Vestal Medical Center who determined that she was suffering from dementia and was unable to make her own medical decisions. Subsequently, on January 13, 2021, Dr. Sae-Joun Park, Ms. Moulton-Barrett’s primary care doctor, also determined that she was not competent to make health care decisions. On January 25, 2021, Plaintiff filed an action under Mental Health Law Article 81 for an appointment of a guardian of the person and a guardian of the property for Ms. Moulton-Barrett, who was 97 years old at the time. In that

---

<sup>1</sup> All the papers filed in connection with the motions and opposition are included in the NYSCEF electronic case file, and have been considered by the Court.

guardianship action, Plaintiff (Petitioner in the Article 81 action) alleged that Ms. Moulton-Barrett suffered from severe dementia and multiple other medical conditions that rendered her unable to safely take care of her health care needs and financial matters, such that appointment of a guardian of the person and of the property was appropriate. The case was given index number EFCA2021000192, and an attorney was appointed as counsel for Ms. Moulton-Barrett to assist her in the action.

The court (Guy, AJSC) conducted a hearing on the Article 81 proceeding on April 9, 2021 and ultimately determined that Ms. Moulton-Barrett had limitations impacting her ability to address personal and financial matters that merited appointment of a guardian of her person and a guardian of her property. Judge Guy appointed CMFA, a geriatric care manager, as person guardian, and Members Trust Company as the property guardian. Ms. Moulton-Barrett passed away on June 30, 2021, and subsequently, both guardians filed separate petitions to be discharged as guardians. Plaintiff objected to the discharge petition of the person's guardian, and requested discovery. In particular, Plaintiff objected to certain expenses related to the cost of care, and also noted his disagreement with decisions made concerning the type of health care provided. Plaintiff contended that he was not informed that decisions were being made for an "end of life care" program (including hospice care), which Plaintiff contends were against Ms. Moulton-Barrett's wishes.

In a Decision and Order dated September 22, 2021, Judge Guy found that Plaintiff had not raised sufficient factual questions to warrant a hearing on the issue of the personal guardian's discharge, and that further discovery was not warranted regarding the decision making process that was followed. Therefore, Petitioner's objections were dismissed.

Plaintiff commenced this action on November 4, 2021, setting forth four causes of action. The first is for wrongful death and a survival action against the Ascension Defendants based on medical malpractice and lack of informed consent. The second cause of action is also a wrongful death and survival action against CMFA and Evanoski based on negligence, professional negligence and breach of fiduciary duty in capacity as a guardian of the person. The third cause of action is against Ascension, Lourdes Hospital and CMFA based on negligent hiring, retention, supervision and/or training. The fourth cause of action is for pecuniary loss and loss of society, due to alleged reckless and incompetent at-home hospice care that led to decedent's death.

CMFA and Evanoski filed a motion for summary judgment on January 14, 2022 seeking dismissal based on res judicata and/or collateral estoppel. They argue that the prior Article 81 action already determined that the decisions made by the personal guardian were made in conjunction with the wishes of Ms. Moulton-Barrett, and if not, that CMFA and Evanoski had the authority to make those decisions on her behalf. They contend that the prior determinations in the Article 81 case preclude Plaintiff's current complaint.

The Ascension Defendants also argue that the prior case precludes Plaintiff's current complaint against them. They argue that the dispositive determinations made in EFCA2021000192 should be adopted in the present case, which would then preclude the arguments being raised in the instant action. They also seek to seal their affirmation in support of the motion. They also point out that Plaintiff has not filed a Certificate of Merit as required under CPLR § 3012-a.

Plaintiff filed a cross motion seeking permission to file a late Certificate of Merit, on the basis that the Complaint and opposition to the motion provide notice of the merits of the case. Plaintiff also submitted an affirmation in opposition to both of the motions to dismiss.

## **LEGAL DISCUSSION AND ANALYSIS**

“Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action” *Simmons v. Trans Express*, 37 NY3d 107, 111 (2021), quoting *Parker v. Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 (1999) (other citation omitted), and it can extend beyond attempts to relitigate identical claims. New York has “applied a ‘transactional analysis approach’ in determining whether an earlier judgment has claim preclusive effect, such that ‘once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy’” *Simmons v. Trans Express*, 37 NY3d at 112, quoting *O’Brien v. City of Syracuse*, 54 NY2d 353, 357 (1981). Thus, res judicata can apply not only to the claims that were litigated, but also to claims that could have been brought in the prior action. *Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 31 NY3d 64, 72 (2018); *Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 NY 304 (1929); *Bernstein v. State of New York*, 129 AD3d 1358, 1359 (3<sup>rd</sup> Dept. 2015). A predicate to the application of res judicata

is that “the party to be barred had a full and fair opportunity to litigate any cause of action arising out of the same transaction and the prior disposition was a final judgment on the merits” *Tovar v. Tesoros Prop. Mgt., L.L.C.*, 119 AD3d 1127, 1128 (3<sup>rd</sup> Dept. 2014).

Collateral estoppel is a narrower concept than res judicata but also deals with the preclusive effects of a prior action. *Cartagena v. Lee*, 202 AD3d 746, 747 (2<sup>nd</sup> Dept. 2022). Collateral estoppel “precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the . . . causes of action are the same” *Parker v. Blauvelt Volunteer Fire Co.*, 93 NY2d at 349, quoting *Ryan v. New York Tel. Co.*, 62 NY2d 494, 500 (1984). Collateral estoppel focuses on issues, while res judicata deals with claims. See, *People v. Evans*, 94 NY2d 499 (2000). Collateral estoppel “applies only where ‘the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action,’ and the party who is being estopped ‘had a full and fair opportunity to litigate the issue in the earlier action’” *Simmons v. Trans Express*, 37 NY3d at 112, quoting *Parker v. Blauvelt Volunteer Fire Co.*, 93 NY2d at 349 (other citations omitted); see, *Conason v. Megan Holding, LLC*, 25 NY3d 1 (2015). “Issue preclusion applies only to issues *actually* litigated” *Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 31 NY3d at 72 (emphasis in original).

The Court will begin by turning first to the res judicata/collateral estoppel arguments of CMFA and Evanoski. In the Article 81 action, following the passing of Ms. Moulton-Barrett, CMFA submitted its final report as guardian of the person, and sought to be discharged. That application was opposed by Plaintiff. Evanoski then filed an affidavit in response to Plaintiff’s objections. Thus, Plaintiff, CMFA and Evanoski were all parties to the earlier action.

Even though the same parties were involved in the Article 81 proceeding, Plaintiff does not agree that res judicata or collateral estoppel applies. Plaintiff argues that the wrongful death and survival action were not involved in the Article 81 action so they cannot be precluded in this action, and in any event, Plaintiff was prevented from fully litigating the claims.

Res judicata serves to prevent the costs of multiple lawsuits, avoid the potential for inconsistent decisions and resolve claims with finality. *Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 31 NY3d at 73. It can “foreclos[e] litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.” *Migra v. Warren City School Dist. Bd. of Education*, 465 US 75, 77, n.1 (1984). While the parties are

the same in this case as in the Article 81 action, Plaintiff herein could not have made wrongful death or survival action claims in the earlier action. Judge Guy's decision was in the context of considering the person guardian's request for payment of fees and discharge in an Article 81 case. It was not broad enough to encompass the claims being made in this case against CMFA and Evanoski. Therefore, the Court concludes that res judicata does not preclude the claims made in this case because those claims were not specifically resolved in the earlier action, and Plaintiff could not have brought up those claims for resolution in the Article 81 case.

The Court next turns to consider whether collateral estoppel applies. The Court must review what the allegations were in the prior case, what the findings were, and whether those determinations should be given preclusive effect in this matter.

In the case before this Court, the allegations of wrongful death and survival actions against CMFA and Evanoski are contained in paragraphs 59-69 of the Complaint. Amongst other things, Plaintiff alleges that: the actions of these Defendants were careless, negligent, reckless and unlawful and were the proximate cause of decedent's death and damages to Plaintiff (§ 60); the actions of these Defendants caused the decedent to suffer injuries during her lifetime that are recoverable by her estate (§§ 61,62); the Defendants are vicariously liable for negligent actions that led to decedent's death (§ 63); the actions of these Defendants were a violation of the fiduciary duties owed by the guardian of the person to the decedent (§ 65); decedent's conscious pain and suffering resulting in her death were caused by the negligent and reckless conduct of these Defendants (§ 66); decedent's estate incurred unnecessary and excessive home hospice costs and other pecuniary loss (§ 67), and gross negligence by these Defendants (§ 68).

In the Article 81 proceeding, CMFA sought payment of bills and then discharge from its guardianship duties. Plaintiff objected to payment of the bills and sought discovery on how decisions had been made, particularly with respect to Ms. Moulton-Barrett entering hospice care. Plaintiff has asserted that he did not approve of hospice care for Ms. Moulton-Barrett at that time, and that efforts should be maintained for improvement of Ms. Moulton-Barrett's medical condition. After consideration of the parties' arguments, Judge Guy directed that the CMFA's bills should be paid. Judge Guy reviewed objections related to "goods purchased and services rendered to or on behalf of [Ms. Moulton-Barrett]" and found those expenses to be reasonable. Judge Guy also considered challenges to 24/7 hourly billing for care provided to Ms. Moulton-Barrett, and concluded that CMFA and Evanoski made a reasonable decision for round-the-clock

care, and he dismissed objections to those payments. Judge Guy also noted and addressed objections that Plaintiff raised concerning “his disagreement with the decisions his mother made regarding her own care, which were implemented by the person guardian” and questions about decisions made during decedent’s last two weeks of life. Plaintiff claims that his mother was refusing to accept his recommendations concerning her care, including whether or not to enter hospice care. Based on the evidence, Judge Guy found that Ms. Moulton-Barrett “was actively participating in her personal and medical decision making” (Decision and Order dated 9/22/21 at p.7). Furthermore, even if she did not directly make a decision herself, the person guardian was imbued with the authority to make that determination subject to her input and taking her wishes and desires into consideration, and that Plaintiff/Petitioner had not raised a sufficient factual issue to warrant a hearing.

The Court must evaluate the prior case and decision to determine if the findings in the prior action have preclusive effects on the current case. Here, Plaintiff has asserted that CMFA and Evanoski engaged in careless, negligent, reckless and unlawful conduct. Although the prior action was a guardianship proceeding and the decision of Judge Guy was relative to payment of guardian bills, the decision addressed the same issues being raised here. CMFA was lawfully appointed as person guardian and was responsible for determining who would provide personal care, healthcare and assistance for the personal needs and health of Ms. Moulton-Barrett. Judge Guy’s decision already concluded that there was insufficient evidence to suggest that the decisions made with respect to Ms. Moulton-Barrett’s care failed to take into account the decedent’s wishes and desires; and further, that even if she did not make one or more of the personal decisions, CFMA had the authority and responsibility to do so on her behalf. Regardless of Plaintiff’s apparent disagreement with the implementation of hospice care, Judge Guy’s decision concluded that the guardian’s initial and final report indicate that decedent was actively participating in the decision-making process. With respect to hospice care, that would also require medical evidence to substantiate the patient’s condition and prognosis, thereby providing an additional assurance that the decision was reasonable given the medical condition. CFMA could not make the medical judgment for hospice care. So, either Ms. Moulton-Barrett was active in making the decisions, or CFMA made them on her behalf. Such a finding undercuts any claim that the guardian’s actions were careless, negligent, reckless or the result of unlawful conduct.

The Court is also not persuaded that Plaintiff did not have an opportunity to fully and fairly litigate the issues. Plaintiff did object to the person guardian's final report. Although Judge Guy did not permit the discovery which Plaintiff requested, that simply means it was not necessary as Plaintiff had failed to raise factual questions that would warrant a hearing on the person guardian's discharge, and that Plaintiff failed to raise factual issues warranting further discovery on the end-of-life treatment decisions. Plaintiff made that argument and lost on it. Judge Guy concluded that Ms. Moulton-Barrett was involved in making the decisions affecting her personal and medical situation. Even if she did not directly make those decisions, CMFA had the authority and obligation to make those decisions on her behalf. In *Greenberg v. Montefiore New Rochelle Hosp.*, 205 AD3d 47 (1<sup>st</sup> Dept. 2022), the First Department held that failure to follow a decedent's directive regarding end-of-life instructions can result in liability for additional pain and suffering of the decedent that could have been avoided if the directives were followed. Accordingly, CMFA would not be able to substitute Plaintiff's wishes to overrule decedent's wishes. Judge Guy found that CMFA fulfilled its obligations on that issue. That determination is entitled to preclusive effect in this case, and prevents the Plaintiff from claiming that CMFA's action were careless, negligent, reckless and unlawful. The claim for professional malpractice does not fare any better. A determination "adverse to the patient in an action to recover fees for the rendering of professional services precludes the commencement of a malpractice action with regard to the same services" *Ahearn v. Arvan*, 2 AD3d 469, 470 (2<sup>nd</sup> Dept. 2003) (citation omitted). Judge Guy ruled in favor of CMFA regarding their claim for fees, so malpractice is no longer a viable claim.

For all the foregoing reasons, the Court finds that collateral estoppel bars the claims in the second cause of action against CMFA and Evanoski. The prior decision in the Article 81 case determined that CMFA acted properly in its capacity as person guardian for Ms. Moulton-Barrett.

The third cause of action is against Ascension, Lourdes Hospital and CMFA based upon negligent hiring/retention/supervision. Since Plaintiff is collaterally estopped from claiming that CMFA's conduct was negligent or reckless, he cannot prevail against CMFA on this cause of action either. CMFA had authority to make medical decisions on behalf of Ms. Moulton-Barrett, and its employee (Evanoski) acted consistent with that authority. Plaintiff does not set forth any

allegation related to any employees' or independent contractors' actions causing the damages. The allegations in the complaint were resolved by the prior Article 81 decision.

Similarly, the fourth cause of action, based on wrongful death, pecuniary loss and loss of society is precluded on the same bases. Since CFMA acted within its authority and discharged its duties properly, this cause of action must be dismissed.

The Court next turns to the claims against the Ascension Defendants. They were not parties to the Article 81 action, so there was not an identity of parties. Generally, an entity who was not a party to the earlier action does not want to be bound by the findings made in that action. This case presents the opposite situation. Due to the unsuccessful challenge made by the Plaintiff/Petitioner in the Article 81 action, the Ascension Defendants are attempting to use the findings made in the earlier action as a sword to prevent claims being made against them in this action.

Ascension was not a party in that Article 81 proceeding and the issues raised therein did not involve Ascension. That action was limited to the propriety of decisions made by CMFA in its role as person guardian. A finding that CFMA acted in accordance with its responsibilities does not necessarily mean that Ascension is insulated from any liability. For example, CFMA may have properly relied upon medical opinions provided by Ascension Defendants as to the decedent's medical condition, prognosis and need for end-of-life planning, including hospice. It is still possible that the medical decisions and recommendations fell below the standard of care. CFMA may have reasonably relied upon those reports and there can still be claims made against the Ascension Defendants.

Ascension claims that insofar as the prior decision concluded that Ms. Moulton-Barrett was capable of making her own medical determinations, and did so with the assistance of her person guardian, it precludes a claim that Ascension Defendants acted against her wishes in admitting her into hospice. However, that too, is dependent upon proper medical advice from the Ascension Defendants.

The prior decision of Judge Guy does not preclude the claims advanced against the Ascension defendants. Therefore CPLR 3211(a)(5) does not apply. Ascension's argument for dismissal based upon failure to state a cause of action is also premised on res judicata and/or collateral estoppel, and since CPLR 3211 (a)(5) does not apply, the motion to dismiss for failure to state a cause of action must also be denied.

Both Defendants have also sought to seal the affirmations and exhibits submitted in support of their respective motions. The Article 81 proceeding is confidential and automatically sealed. Judge Guy refused to even consider some medical records presented in the Petition to discharge the person guardian because the decedent had not waived her privilege. Although Plaintiff claims that the earlier decision was published online in LEXIS, the names were redacted. For good cause shown, the affirmations in both motions, together with the supporting exhibits, are sealed and may be opened or inspected upon further order of the Court, except for the attorneys of record for the parties to this action.

Lastly, Plaintiff seeks an order extending his time to serve a late Certificate of Merit and has attached a Proposed Certificate of Merit. CPLR 3012-a does not authorize dismissal for simply failing to provide a Certificate of Merit, and CPLR 2004 permits a Court to extend the time for doing an act. *See, Horn v. Boyle*, 260 AD2d 76 (3<sup>rd</sup> Dept. 1999). The main purpose of requiring a Certificate of Merit is to ensure there is some basis to commence the action. All that is required is that counsel has conferred with a physician who can attest to the reasonable basis for the claim being made. Plaintiff is a physician, and his attorney affirmed he consulted with Plaintiff doctor about the merits of the malpractice claims raised in this case. Even if the Certificate of Merit is not timely, there is no prejudice in granting Plaintiff's request to permit the late Certificate of Merit, and Plaintiff has cured the defect. Accordingly, Plaintiff's cross motion to file a Certificate of Merit is granted.

## **CONCLUSION**

Based on the foregoing discussion, it is hereby

ORDERED, that the motion of CMFA and Evanoski for dismissal of the Complaint as to those Defendants is GRANTED; and it is further

ORDERED, that the motion of the Ascension Defendants for dismissal of the Complaint against them is DENIED; and it is further

ORDERED, that the request to seal the affirmations and exhibits in support of both motions to dismiss is GRANTED and the relevant affirmations and exhibits are sealed and may be opened or inspected upon further order of the Court, except for the attorneys of record for the parties to this action; and it is further

ORDERED, that Plaintiff's cross-motion for leave to file a Certificate of Merit is GRANTED, and the Proposed Certificate of Merit attached to Plaintiff's motion is accepted as said Certificate of Merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

ENTER:

Dated: June 30, 2022  
Binghamton, New York



---

HON. EUGENE D. FAUGHNAN  
Supreme Court Justice